UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LENNY K. VAUGHAN,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DA-0752-96-0458-C-1

DATE: February 19, 1998

Roscoe E. Long, Esquire, Dunedin, Florida, for the appellant.

Arthur Tovar, Coppell, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of a compliance initial decision that denied his petition for enforcement. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the compliance initial decision, and REMAND the petition for further adjudication. 5 C.F.R. § 1201.117.

BACKGROUND

After the appellant appealed the agency's action demoting him from his EAS-15 Networks Specialist position to a PS-5 Part-time Flexible Distribution Clerk position based on alleged misconduct, the parties entered into a written

settlement agreement resolving the appeal. MSPB Docket No. DA-0752-96-0458-I-1 Initial Appeal File (IAF), Tab 1, Tab 3, Subtab 4a, and Tab 11. The administrative judge dismissed the appeal on that basis, after finding that the settlement agreement met the Board's criteria for validity and after accepting it into the record for enforcement. IAF, Tab 12.

The appellant filed a petition for enforcement, alleging that the agency violated the settlement agreement by failing to give a neutral reference for outside employment, failing to afford him the appropriate compensation for fiscal year 1996 on the basis of his revised performance appraisal, and failing to purge his Official Personnel File (OPF) of references to the settled matter. MSPB Docket No. DA-0752-96-0458-C-1 (Compliance IAF), Tab 1. The administrative judge issued an acknowledgment order and the agency responded. *Id*., Tabs 2, 3. The appellant replied in affidavit form, alleging the same violations of the settlement agreement in somewhat greater detail. *Id*., Tab 4. The administrative judge issued a compliance initial decision finding that the agency had complied with the terms of the settlement agreement and denying the appellant's petition for enforcement. *Id*., Tab 9.

On petition for review of the compliance initial decision, the appellant asserts that the administrative judge erred in finding that the agency did not breach the settlement agreement by divulging adverse information about the appellant and by refusing to pay him a bonus based on his "satisfactory" performance rating for 1996. Petition For Review (PFR) File, Tab 1. The agency has timely responded in opposition to the petition for review. *Id*., Tab 3. On October 20, 1997, after the close of the record on review, the appellant submitted a summary of a decision by the U.S. Court of Appeals for the Federal Circuit in *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439 (Fed. Cir. 1997), that was issued by the court after the close of the record on review. PFR File, Tab 4.

ANALYSIS

The appellant alleged below that the agency failed to comply with the term of the settlement agreement requiring the agency to give "a neutral reference for outside employment." *See* Compliance IAF, Tab 1; IAF, Tab 11. According to the appellant's affidavit, after resigning from his position with the agency in Tyler, Texas, he was hired by Trinity Mother Frances Home Care in Tyler, Texas, but was terminated on November 29, 1996. The appellant asserted that Doug Mehling, Executive Director of Trinity Mother Frances Home Care, informed him that he had telephoned the agency, and that he knew of an incident involving the appellant's father and the agency in 1986 in which the agency proposed to remove the appellant's father based on a charge of sexual harassment. Mehling assertedly commented to the appellant "like father, like son," which the appellant interpreted as referring to rumors of a relationship between the appellant and a former employee of Mehling. From this conversation, the appellant concluded that Mehling had been given information about his father. The appellant stated further that Gary and Pat Hoehn, providers of contract services for Trinity Mother Frances Home Care, told the appellant that Mehling told them that the agency fired the appellant for stealing money. The appellant stated that he believed that Mehling learned of the incidents involving the appellant and his father from Jim Gautney, whom the appellant described as "an executive level manager in Human Resources" in the agency's Southwest Area Office in Dallas, Texas, and a neighbor and acquaintance of Mehling's. Compliance IAF, Tab 4.

The appellant also stated that his resume gives Ray Henson, his former supervisor and Plant Manager of the agency's Tyler, Texas plant, as a reference. The appellant stated that Henson was transferred from that position and that Kenneth Drain was now the Tyler, Texas Plant Manager, and that the agency did not provide a statement from Drain regarding whether he received any inquiries from employers about the appellant. The appellant surmised that Drain, as

Henson's replacement, did receive such inquiries and disclosed confidential information. *Id*.

The appellant also alleged in his unsworn petition for enforcement that the selecting official for a position with the U.S. Probation Office, for which the appellant applied, may have received a copy of his OPF containing references to the appellant's Board appeal and that he may have received "verbal affirmation of the incident." Compliance IAF, Tab 1 at 2. The appellant further alleged that three other potential employers may also have been given information about his appeal because they showed great interest in the appellant at first but then did not return his telephone calls. *Id*.

To refute the appellant's allegations, the agency submitted a March 18, 1997 written statement from Senior Personnel Services Specialist Jonda Hill. She stated that, as required by the Privacy Act, the Personnel Services Department provides only job title, grade, salary, duty status, and dates of employment with the agency in response to inquiries from prospective employers. She further stated that she knew of no inquiries received by the agency regarding the appellant since his resignation. Compliance IAF, Tab 3.

Although the ultimate burden is on the appellant, as the party seeking enforcement, to show that an agency failed to fulfill the terms of the settlement agreement, the agency must produce relevant, material, and credible evidence of its compliance with the agreement upon the filing of a petition for enforcement by the appellant. *Jones v. Office of Personnel Management*, 61 M.S.P.R. 252, 254 (1994).

We note that the administrative judge did not inform the appellant that he bore the burden of proving that the agency did not comply with the settlement agreement or of what he must do to meet his burden of proof. *See Anthony v. Department of Justice*, 76 M.S.P.R. 45, 51 (1997). The evidence submitted by the appellant in the form of his affidavit is insufficient to show that agency personnel

disclosed confidential information in violation of the agreement. Compliance IAF, Tab 4. He identified two possible sources of negative information, Jim Gautney and Kenneth Drain, but did not indicate that he requested sworn statements from them regarding whether they had spoken to Mehling or other prospective employers about the appellant. The appellant did not identify the prospective employers or indicate that he requested evidence from them regarding any contact with agency personnel about the appellant. *See id.*

However, as stated above, once the appellant makes an allegation of noncompliance, the agency has the burden of coming forward with evidence to show that it has complied with the settlement agreement. *Jones*, 61 M.S.P.R. at 254. Here, the agency only submitted Hill's unsworn statement that, as far as she knew and could ascertain, no inquiries regarding the appellant had been made to the agency. Although both Gautney and Drain are agency employees and were identified by the appellant in his affidavit as possible sources of adverse information, the agency did not submit their sworn statements in response to the appellant's allegations in his affidavit. As the current supervisor at the location where the appellant last worked, Drain might very well have received inquiries from prospective employers of the appellant.

The agency argued below in response to the petition for enforcement that Gautney is not an employee in the Personnel Services Department of the Dallas District Office and that "[t]he agency cannot be held accountable for alleged conversation between neighbors or any other unofficial rumor mills." Compliance IAF, Tab 3 at 1-2. The settlement agreement does not identify specific persons who are subject to the neutral reference provision. When a term of an agreement is ambiguous, the ambiguity should be resolved in a manner that is consistent with the purpose and effect of the agreement and with the intent of the parties. *Thomas*, 124 F.3d at 1442. We do not agree with the agency that the neutral reference term applies only to employees in the Personnel Services Department of

the Dallas District Office. As the court in *Thomas* noted, inadvertent leaks are an inherent risk in confidentiality agreements. "When, however, the leak comes directly from a responsible official inside the agency in response to an inevitable inquiry from a potential employer, we cannot permit the agency that willingly entered into such an arrangement to breach it without being held responsible." *Id.* Because of the lack of evidence in the record, we are unable to determine whether Gautney was obligated by the neutral reference provision of the settlement agreement not to disclose adverse information about the appellant. However, as a high level manager in Human Resources, presumably familiar with personnel issues, he might be expected to be experienced with similar settlement agreements and to be cautious about revealing information to a prospective employer of a former agency employee. Thus, we find it necessary to remand this petition to afford the parties an opportunity to submit further evidence to substantiate or refute the allegation that agency personnel violated the settlement agreement's provision that the appellant would be given "a neutral reference for outside employment." Compliance IAF, Tab 3.

The appellant also contended below that the agency failed to comply with the settlement agreement by refusing to pay him a bonus given to all agency managers with a "satisfactory or met expectation" or better performance rating in fiscal year 1996. Compliance IAF, Tab 1. The settlement agreement provided that the appellant's performance rating for 1995/1996 would be changed to "a satisfactory or met expectation." IAF, Tab 11. The appellant submitted below a March 17, 1997 letter to him from Hill informing him of a "special pay adjustment" for which the appellant may not be entitled. Compliance IAF, Tab 4. Hill further stated in the letter that agency personnel at the Minneapolis Postal Data Center were looking into the matter and that the appellant would be informed of the results of the investigation. *Id.* The appellant also submitted below a March 19, 1997 letter to him from Cindy Slay, an agency official in

Coppell, Texas, informing him that a check to him representing a special pay adjustment had been returned to the Minneapolis Disbursing Branch because he was not entitled to the payment. *Id*. The agency argued that the settlement agreement did not specifically provide for payment of a bonus or any compensation to the appellant as the result of changing his evaluation, but the agency did not submit any evidence to show that the appellant did not meet the qualifications for receiving such a bonus. IAF, Tab 3.

In a somewhat similar appeal, *Basbas v. U.S. Postal Service*, 74 M.S.P.R. 516, 519-20 (1997), the appellant asserted that he was entitled to a 6% fiscal year 1995 performance award given to all Postal Career Executive Service (PCES) employees in his geographic area as part of his retained "benefits" under paragraph 4 of the settlement agreement. The Board found that bona fide consideration for an annual performance award was a benefit of PCES employment, that PCES employees in the geographic area in which that appellant worked received the 6% pay increase based on the performance of the group, that the appellant was a member of the group, and thus that the 6% fiscal year 1995 performance award was a benefit due him under the settlement agreement. *See Basbas*, 74 M.S.P.R. at 519-20.

Here, if all employees with a "satisfactory or met expectation" or better performance rating for the relevant rating period in a group to which the appellant belonged were given a bonus, and no other circumstance disqualifies him from receiving the bonus, then he may be entitled to the bonus as a result of the change in his performance rating. *See id.* We are unable to make that determination on the record because of the lack of evidence to show the criteria for award of the bonus. On remand, the parties shall submit additional evidence regarding the appellant's entitlement to the bonus.

The appellant asserted below that the agency did not show that it purged his OPF of references to the adverse action, as provided for in the settlement

agreement. Compliance IAF, Tab 1. In response, the agency alleged that its representative and Personnel Services Specialist Hill reviewed the OPF and found no such references to the adverse action. *Id*., Tab 3. The administrative judge issued a May 30, 1997 summary of a prehearing conference, including a statement of the issues, in which he stated that the agency's representative agreed to allow the appellant to review his OPF on May 20, 1997. The administrative judge informed the parties that, if they disagreed with the summary, they could file a written objection. *Id*., Tab 7 note. The appellant did not so object. In the compliance initial decision, the administrative judge found that the agency was in compliance with this term of the agreement based on the evidence of record. Compliance Initial Decision at 5. On petition for review, the appellant does not assert that he was not afforded an opportunity to review his OPF or that, upon review, he found references to the adverse action inside, in violation of the settlement agreement. He merely states that "[i]t was not until after the appellant filed his Petition for Enforcement that the agency's representative contends that he reviewed the appellant's OPF and found [nothing] in it relating to the adverse action." PFR File, Tab 1 at 3. Even if we assume that the agency did not purge the appellant's OPF until the representative reviewed it, it appears that the file has been purged because the appellant does not allege otherwise on petition for review. We find the agency in compliance with this term of the settlement agreement.

On petition for review, the appellant asserts that he should have been afforded a hearing on his petition for enforcement. PFR File, Tab 1. The Board's regulations do not provide that a party submitting a petition for enforcement has a right to a hearing, but the administrative judge may in his discretion afford such a hearing, if necessary to resolve disputed facts. 5 C.F.R. § 1201.183(a)(3); *Ben Espinoza v. Department of the Navy*, 69 M.S.P.R. 679, 683 (1996), *dismissed*, 86 F.3d. 1174 (Fed. Cir. 1996) (Table). The administrative judge shall determine on

the basis of the evidence in the record and any further evidence submitted on remand whether a hearing is warranted in this matter.

Accordingly, we remand this petition to the Dallas Field Office for further adjudication.

ORDER

On remand, the administrative judge shall afford the parties an additional opportunity to submit evidence and argument to substantiate or refute the appellant's assertions that the agency breached the settlement agreement by disclosing information made confidential by the settlement agreement and by failing to pay him a bonus based on his "satisfactory" performance rating for fiscal year 1996. The administrative judge shall also determine, based on the evidence in the record and any further evidence submitted on remand, whether a hearing is warranted to resolve factual matters in dispute. After affording such a hearing, if necessary, the administrative judge shall issue a new compliance initial decision determining whether the agency has complied with the settlement agreement.

FOR THE BOARD:
Washington, D.C.

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Robert E. Taylor
Clerk of the Board